No. 14,968

United States
COURT OF APPEALS
for the Ninth Circuit

HARRY X. BERGMAN, PERMA-LOX ALUMINUM SHINGLE CORPORATION and VICTOR H. LANGVILLE, doing business under the assumed name of Langville Manufacturing Company,

Appellants-Petitioners,

vs.

ALUMINUM LOCK SHINGLE CORPORATION OF AMERICA,

Appellee-Respondent.

OBJECTION TO PETITION FOR RE-HEARING

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The question presented by Appellants' petition for re-hearing involves the impact of **Rule 54(b) F. R. C. P. on Sections 1291 and 1292, Title 28 U.S.C.A.**

I

The decree was not appealable under **Section 1292 (1), Title 28 U.S.C.A.** Subdivision 1 of that section

relates to interlocutory "orders" granting or refusing injunctions as distinguished from interloctutory "decrees" and "judgments". The interloctutory "orders" in subdivision 1 are the orders granting, refusing or modifying preliminary injunctions and do not relate to "decrees" or "judgments" granting or denying injunctions.

In the several subdivisions, the terms "orders", "decrees", "judgments" are not used interchangeable or cumulatively. They are used specifically in relation to each type of determination.

The revisers' notice to **Section 1292** says:

> "Words in said section 227 'or decree,' after 'interlocutory order,' were deleted in view of Rule 65 of the Federal Rules of Civil Procedure, using only the word 'order.' " (p. 376).

Rule 65, referred to in the note, governs "preliminary injunctions" only.

The appeal in this case was not from an interlocutory "order" granting a temporary injunction. The appeal was taken from a "judgment" which must be final even though it determines one or more but less than all of the multiple claims.

> **Sears Roebuck & Co. v. Mackey, 351 U.S. 427, 76 S.Ct. 895,** decided June 11, 1956.

and companion case decided at the same time

> **Cold Metal Products Co. v. U. S. Engineering and Foundry Co., 76 S. Ct. 904.**

This Court did not overlook the provisions of subdivision 4 of Section 1292. The Court dealt with

the matter specifically and held that it was not applicable. The petition for re-hearing does not demonstrate any error or omission in that determination.

II

It is conceded that as to defendants Bergman and Perma-Lox, the judgment adjudicated "less "less than all the claims between plaintiff and these defendants" (p. 2).

It is contended that as to defendant Langville, the judgment determined all of the claims except accounting and on that theory, it is argued that subdivision 4 is applicable as to him.

The record does not sustain this contention. The complaint alleged that defendant Langville manufactured the infringing shingle **for defendants** Perma-Lox and Bergman (Tr. 4) (subpar. C). The findings recite that Langville "manufactures **for the account** of Bergman and Perma-Lox" aluminum shingles which infringe, etc. (Tr. 47). The complaint prayed for relief against all defendants, including Langville separately and "collectively" (Tr. 9) with respect to the issues of validity of the patent, infringement, injunction, accounting, damages and attorneys' fees (Tr. 9). The judgment adjudicated that all defendants, including Langville, "collectively" infringed the patent; that the accounting be had from all of the defendants "collectively" and that all defendants were enjoined from making and selling the infringing shingle (Tr. 55-56).

There was no separate judgment against defendant Langville.

The appeal was taken by all of the defendants, including Langville, **jointly** by one notice of appeal (Tr. 56).

The issue of damages, accounting and attorneys' fees are still open as against defendant Langville. These isues, in conjunction with the issues of validity and infringement, created "multiple claims" within the meaning of Section 54(b).

The decree cannot be severed and converted into a separate decree as against defendant Langville to bring him within the purview of **paragraph 4 of Section 1292.**

III

There is no diversity of opinion with respect to the specific question involved in this case.

We have here a case involving "multiple claims" in which a judgment was rendered adjudicating less than all of the claims and specifically reserving for determination all the remaining claims presented by the pleadings.

At the present state of the record, the question is not so much one of finality as it is whether the question of finality can be tendered to the Court of Appeals for determination in the absence of "an express determination (in the judgment) that there is "no reason for delay and upon an express direction for the entry of the judgment" as required

by **Rule 54(b) F. R. C. P.** in a case involving multiple claims in which less than all of the claims have been adjudicated. The Supreme Court has very recently decided that it cannot be done.

In the **Sears Roebuck and the Cold Metals Products cases,** supra, the Supreme Court dealt with the impact of **Section 54(b) F. R. C. P.** on **Sections 1291 and 1292, Title 28 U.S.C.A.** and held that in a multiple claims case where less than all of the claims have been adjudicated, there can be no appeal in any event unless the District Court makes the "express determination" required by **Section 54(b).** Jurisdiction of the Court of Appeals is precluded unless that express determination is made by the District Court.

When this "express determination" is made, the question of finality is not foreclosed. It may then be determined by the Court of Appeals, either of its own motion or on motion of the appellee in accordance with the well established rules governing finality which the Court held remained unchanged.

The petition for re-hearing asserts that the appeal had to be taken within the thirty day period as required by **Rule 73(a).** The Supreme Court held that **Rule 54(b)** in its present form, was designed to avoid any uncertainty as to when the appeal should be taken. The Court said:

> "A party adversely affected by a final decision thus knows that his time for appeal will **not** run against him until this certification has been made." (Emphasis by the Court).

(a) The determination of the claim adjudicated must be **final;**

(b) The judgment or decree must contain the "express determination" described in **Rule 54(b);** and

(c) The Court of Appeals must be satisfied that there has been no abuse of discretion.

The petition for re-hearing should be denied.

Respectfully submitted,

S. J. BISCHOFF,
Counsel for Appellee.